



North Dakota Attorney General's LAW REPORT

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BERGHUIS V. THOMPCKINS, 130 S.Ct. 2250 (2010) Miranda - Unruly

A fatal shooting occurred outside a mall in Michigan. One of the suspects, Thompkins, fled but was arrested about a year later. He was questioned for about three hours by officers in a small room. He was advised of his Miranda rights and he actually read part of the written advisement of rights out loud. Thompkins refused to sign a waiver of those rights, but did not say he wanted an attorney or indicated he wanted to remain silent. Thompkins did not speak much but about 2 hours and 45 minutes into the interrogation he broke down and admitted he prayed to God to forgive him for the killing. Thompkins would answer no other questions and would not make a written confession. The statements he did make were used to help convict him.

The Court, in a 5-4 ruling, held that a suspect must unambiguously invoke the Miranda right to remain silent. The Court

determined that because a suspect must unambiguously invoke the right to counsel under Miranda, a different standard should not exist to invoke the right to remain silent. This ruling eliminates the need for officers or courts to interpret any ambiguous behavior. It also allows officers to avoid guessing about a suspect's unclear intentions. A suspect must still knowingly and voluntarily waive the right to remain silent and the government has the burden to show such a waiver. A waiver can be inferred by the actions and words of the person being interrogated.

After a suspect is properly Mirandized, the suspect can now (1) remain silent, (2) invoke the right to remain silent by expressly stating he does not want to speak to the officers, or (3) invoke the right to counsel by expressly requesting an attorney. The conviction was affirmed.

STATE V. MOHL, 2010 ND 120, 784 N.W.2d 128

Reasonable Suspicion to Stop

Mohl's vehicle was followed for about three miles by an officer who saw it touch the fog line and center line numerous times. The vehicle did not cross either line and was not speeding. The vehicle was stopped for erratic driving and that ultimately lead to charges of driving under the influence. Mohl moved to suppress arguing the officer did not have a

reasonable and articulable suspicion to stop the vehicle, and did not have probable cause to arrest. The motion was denied and Mohl appealed that ruling after conditionally pleading guilty.

Mohl argues that weaving within a lane of travel does not give rise to a reasonable and articulable suspicion to stop the

vehicle. The court said it considers the totality-of-the-circumstances; that an officer must have more than a mere hunch but doesn't have to isolate one single factor that justifies the stop. Here

the court found enough for the stop. The officer was experienced, it was about 1:30 a.m., Mohl's vehicle touched each lane boundary line many times. Mohl's conviction was upheld.

STATE V. WANNER, 2010 ND 121, 784 N.W.2d 143

Trial Issues

Wanner was charged with a B felony criminal mischief. Many witnesses testified at the trial establishing that fires destroyed several vehicles. Gas cans left behind were traced to Wal-Mart and a surveillance video was obtained. Wanner's ex-girlfriend said it looked like him in the video and that her current boyfriend's vehicle was one of those burned. At the start of the trial Wanner had moved to sequester witnesses and the court so ordered. One of the state's witnesses remained in the courtroom. After that witness testified, Wanner argued a violation of the sequestration order because the state had not designated the witness as its case representative. Wanner requested a

mistrial or a curative jury instruction. The state argued the witness was its case representative. The court denied Wanner's requests.

The purpose of sequestration is to prevent a witness's testimony from being influenced by hearing others testify. Even though the state did not formally designate that witness as its representative, and the court said the better practice would have been to do so at the time of the sequestration order, any error was not prejudicial to Wanner and was not an abuse of discretion. The witness's testimony was cumulative in nature and Wanner's conviction was upheld.

STATE V. IRWIN, 2010 ND 132, 785 N.W.2d 245

Felony DUI

On June 30, 2007, Irwin was arrested for a fourth offense DUI in seven years, in Burleigh County. Two weeks later he was arrested for DUI in Morton County, which was charged out as fifth DUI in seven years, a C felony. Irwin pled guilty to both charges. Two years later he moved to withdrawn his guilty plea. He appealed the district court's denial of the motion to withdraw his guilty plea on the Morton county case.

Irwin argued he suffered a manifest injustice because on the date of his Morton County DUI arrest he had only been convicted of three DUI's in the previous seven years, the fourth DUI was pending in Burleigh County. N.D.C.C. § 39-08-01 prohibits a fifth or subsequent "offense" in a seven year period. The Court had previously ruled an "offense" could include a DUI conviction that was on appeal. The Court here found that the district court correctly found Irwin's

conviction was a 5th offense in seven years, a C felony. By the time Irwin plead guilty to the Morton County case he had

already plead guilty to and been convicted of the Burleigh County DUI. Irwin's conviction was upheld.

STATE V. LEHMAN, 2010 ND 134, 785 N.W.2d 204

Sufficiency of the Evidence

Lehman appealed his convictions for kidnapping and terrorizing. Lehman worked occasionally as an informant to a bail bond company. Lehman knew the location of an individual who had jumped bail and hoped to be compensated by the bail bondsman for locating the individual. Lehman "arrested" that person and tied his hands behind his back. Lehman drove around town for several hours trying to make arrangements to be paid. Lehman finally agreed to let the person go if he paid him what he expected to get from the bail bondsman if he delivered him there. This plan eventually fell through and Lehman finally took the individual to law enforcement.

Lehman was charged and found guilty of kidnapping and terrorizing. Lehman argues that the trial court erred by failing to instruct the jury as he requested. Lehman contended he did not abduct the individual, as required for kidnapping. Instead he claims he apprehended the individual in the capacity of a bounty hunter. Lehman's actions were not justified as an arrest by a citizen. He did not immediately take the arrestee to law enforcement as required in a citizen's arrest. There is no legal authority that allows a citizen to restrain an individual to obtain a ransom or reward. Lehman's conviction was upheld.

STATE V. POITRA, 2010 ND 137, 785 N.W.2d 225

Search Warrant

Jane Doe was raped at a party that Poitra also attended. Jane Doe was able to provide a description of her assailant which generally matched Poitra. Poitra was arrested on unrelated charges and told officers he was 18 years old. He had no identification to verify his age. Officers connected Poitra to the rape and spoke with him about the rape. Officers asked Poitra for a DNA sample but he said he wanted to speak to his mother first. A search warrant was then obtained for Poitra's DNA and the sample obtained. Jane Doe had also identified Poitra out of a photo line-up. Later, at a court hearing, Poitra finally revealed his actual age of 17. Poitra moved to suppress the DNA

sample obtained and his identification in the photograph by Jane Doe due to his status as a minor. The Court denied these motions and he was convicted of both aggravated assault and gross sexual imposition.

Poitra claimed he had a right to have counsel or parents present for the DNA collection and that his picture also could not be used in a photo lineup because he was a minor.

Unlike cases where a juvenile must consent or refuse to take a chemical test, no choice exists to provide evidence obtained pursuant to a search warrant.

Poitra was responsible for the misinformation about his age as he refused to give his correct date of birth and also claimed he was 18. Poitra did not have a right to have an attorney present before his DNA was obtained pursuant to the warrant.

Poitra also claims the photographs of him were taken in violation because he was a minor. However, law enforcement believed Poitra was 18, based on Poitra's statements and actions. Poitra's conviction was affirmed.

STATE V. MEADOR, 2010 ND 139, 785 N.W.2d 886

Sex Offender Registration

Meador was convicted of several sex related crimes in Kentucky in 1994. When he moved to Valley City in 2008 he registered as a sexual offender. However, he changed his address without notifying law enforcement. He was charged with failing to comply with the sexual offender registration requirements. A jury found Meador guilty. He appealed claiming the sexual offender registration requirement was unconstitutionally applied retroactively to his 1994 Kentucky convictions because North Dakota's registration law was not passed until 1995. Meador asserts the registration requirements are

unconstitutional under the ex post facto clauses of both the North Dakota and United States Constitutions.

The North Dakota Supreme Court has previously ruled that North Dakota's sexual offender registration statute is not violative of ex post facto laws because registration is remedial, not punitive, in nature. The registration law exists to protect the public's right to know and is not classified as punishment to the offender. Meador did not properly notify law enforcement of a change in address in the time limits set by law. Meador's conviction was justified and was upheld.

STATE V. BLUNT, 2010 ND 144, 785 N.W.2d 909

Trial Issues

Blunt was charged with Misapplication of Entrusted Funds for conduct occurring while he was the executive director of Workforce Safety and Insurance. The allegations included gift certificates being given to employees, gifts for meetings and other unauthorized expenditures. Prior to trial Blunt moved to keep the State from aggregating the value of various items to reach \$10,000 total, the amount required for a class B felony conviction. The court denied Blunt's motion and a jury found Blunt guilty of the B felony but not guilty on a second

charge. Blunt appealed his convictions on several grounds. Primarily, he claimed the Court erred in allowing the State to aggregate the amounts of several distinct instances of alleged misapplication to satisfy the \$10,000 threshold for a class B felony.

Rejecting Blunt's argument, the Court relied on the fact that theft statute allows aggregation of loss. The Court also cited a prior opinion on point. Misapplication of entrusted property can be charged as several separate acts or as a continuous

series of acts. In this case the State charged the count Blunt was convicted of as a series of acts with an aggregate loss in excess of \$10,000. The evidence

presented supported the jury's verdict of a loss in that amount. Blunt's conviction was affirmed.

RICHTER V. ND DEPARTMENT OF TRANSPORTATION,
2010 ND 150, 786 N.W.2d 716

Search and Seizure

An officer on routine patrol noticed a vehicle with its engine running and two people inside parked behind a restaurant. The officer was suspicious because the restaurant had been closed for several hours and had been burglarized recently. The officer drove into the lot and parked close to the vehicle, without blocking it in. He did not have emergency lights on but did have headlights on. The officer approached the vehicle shining his flashlight into the passenger side of the vehicle, signaling the passenger to roll down the window. Once the window was down he detected the odor of alcohol and noticed the driver had bloodshot eyes and "thick" speech. Richter, the driver, admitted to drinking alcohol and then failed several field sobriety tests. Richter was arrested for being in actual physical control of a motor vehicle. A blood test registered 0.15 percent blood alcohol concentration.

The Department of Transportation notified Richter of its intent to suspend his driving privileges. At the hearing Richter claimed his Fourth Amendment rights had been violated. The hearing officer ruled the officer's hand gesture to roll down the window was not a seizure under the Fourth Amendment. The hearing officer also found no seizure occurred until after the officer detected the odor of alcohol from inside the vehicle. Richter appealed these findings

to district court. The district court reversed the ruling concluding the officer's actions constituted an unreasonable search and seizure in violation of the Fourth Amendment. The DOT appealed the district court's findings.

Agreeing with the hearing officer's findings, the court noted that not all encounters between law enforcement and citizens are a seizure which triggers the protections of the Fourth Amendment. An officer's approach to a parked car is not a seizure if the officer inquires of the occupants in a conversational manner and does not order the occupant to respond or to take some action. This kind of casual encounter however can lead to a seizure depending on what the officer observes and learns. It is not a Fourth Amendment seizure when an officer taps on a window of a parked car. Here the officer did not order the passenger to roll down the windows. He used a nonverbal gesture as a request. The passenger chose to do so out of respect for the officer. The vehicle was not blocked in by the officer's car and Richter could have just driven away. The Court ruled that the hearing officer was justified in its ruling that a seizure had not occurred. The district court's ruling was reversed and the case sent back to reinstate the hearing officer's findings.

Administrative Subpoenas

Hammer sustained a work related injury and began receiving disability benefits. An investigation was initiated into allegations the Hammer had made material false statements by failing to fully report work activities and income while he was receiving disability benefits. Administrative subpoenas were issued to two banks seeking copies of Hammer's bank statements and deposit slips. Notice of these subpoenas was not given to Hammer. Based on the information received from the subpoenas, WSI began administrative proceedings to terminate Hammer's disability and medical benefits. An administrative law judge determined Hammer had received almost \$25,000 in benefits he was not entitled to and terminated Hammer's benefits and ordered repayment of the benefits he improperly received.

The State then filed criminal charges against Hammer for failing to report wages and filing a false claim. Hammer argued the criminal charges violated his constitutional right against double jeopardy because WSI already penalized him by terminating his benefits.

Hammer also argued the district court should suppress the bank records because WSI conducted an unreasonable search and seizure by obtaining his bank records through an administrative subpoena instead of through a search warrant issued by a neutral and detached magistrate. The

district court denied Hammer's motions and he entered conditional guilty pleas and filed an appeal.

The Court began by stating that the Fourth Amendment does not provide protection against the government obtaining a customer's bank records by subpoena. The records in this case were business records of the bank, not the customer. When a government agency, pursuant to statutory authority, issues a subpoena to a bank seeking the bank's records of a certain customer, these records may be disclosed without the need for a search warrant. The Court went on to say this applies even if a criminal prosecution is contemplated at the time the subpoena is issued.

Turning to the double jeopardy claim, the issue is whether the administrative proceeding is deemed criminal proceedings or not. Administrative proceedings for the reimbursement of benefits paid due to false claims are civil and any sanctions imposed are not criminal penalties. Hammer argued that because his rights to reimbursement for future medical expenses were also terminated the double jeopardy claim would still apply. The court found that the reimbursement of medical expenses is an additional benefit for a compensable injury. Therefore WSI's termination of Hammer's right to medical reimbursement was also a civil sanction. Hammer's appeal was denied.

Consent Search

A probation search was conducted on an apartment Adams shared with a person who was on probation. The roommate's conditions of probation included a search clause. Adams told officers he had just smoked marijuana in the bathroom. Adams also told officers there was marijuana in a dresser in the shared bedroom. The officers found about an ounce of marijuana and \$667 in cash in that dresser. Officers also noticed a locked safe in the bedroom. Neither person would give the officers the combination to the safe or claim the safe as theirs. The officers pried open the safe and found about 3 ounces of marijuana, title to a vehicle belonging to Adams, \$1,200 in cash and a firearm and ammunition. Adams claimed these items belonged to him. Adams was charged with intent to deliver the marijuana. He moved to suppress the evidence claiming the search was unreasonable. The district court denied the motion concluding the search was a valid search incident to arrest and also a reasonable probation search. Adams entered a conditional plea of guilty and appealed the order denying the motion to suppress.

A deferential standard exists when reviewing a district court's ruling on a suppression motion. The Court upheld the district court's rulings in this case, finding specifically that those who live with people on probation assume the risk that their Fourth Amendment rights will be diminished in areas shared with the probationer. The bedroom was an area the probationer shared with Adams. Adams did not tell officers that the safe was his prior to their search of it. The probationer did not tell officers she did not have access to the safe. A reasonable officer could believe they both had access to the safe, because it was located in their shared bedroom. Searching locked boxes which are reasonably accessible by law enforcement was also found to be within the scope of a court ordered warrantless search condition of probation. The Court said concluding the search was unreasonable would give probationers the ability to avoid warrantless searches simply by securing items in a locked box. Adams' conviction was upheld.

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